E
459
.L27
Copy 2

WAS SECESSION TAUGHT AT WEST POINT?

LIBRARY OF CONGRESS
1899

Was Secession Taught at West Point?

MILITARY ORDER OF THE LOYAL LEGION OF THE UNITED STATES

COMMANDERY OF THE STATE OF PENNSYLVANIA

Was Secession Taught at West Point?

READ AT THE MEETING MAY 5 1909

BY

COMPANION BREVET LIEUT.-COLONEL JAMES W. LATTA U. S. V.

1909

E459
.L27
copy 2

GIFT
MRS. MARGARET SCOFIELD CLINE
OCTOBER 4, 1940
THE LIBRARY OF CONGRESS

Was Secession Taught at West Point?

By Brevet Lieut.-Colonel James W. Latta, U. S. V.

FOREWORD.

The following extracts from a few of the many publications that have recently appeared upon the question of the right of a state to secede from the American Union, and matters incident thereto, apparently not yet disposed of, will supply a suitable introduction to and the need for the text that is to follow.

"Another erroneous view of the great struggle, very generally held in the North, is that the South waged the war to perpetuate slavery. Nothing could be further from the truth. The war was fought for constitutional liberty and slavery was only an incident to the great question." New York Times Book Review, Dec. 26, 1908, communicated.

"This public opinion (now prevalent in the South) positively demands that teachers of history, both in the colleges and high schools, shall subscribe unreservedly to two trite oaths: (1) That the South was altogether right in seceding from the Union in 1861; and (2) that the war was not waged about the negro." . . . "Historical scholarship has settled the fact that according to the interpretation of the American Constitution up to the time of the Civil War the Southern States did have the right to secede from the Union," and General Adams adds, "The whole opposite contention from the days of Andrew Jackson and Daniel Webster to 1860 is thus summarily dismissed." . . . Foot note citation to "The Constitutional Ethics of Secession" by Genl. Charles Francis Adams. Proceedings Mass. Hist. Soc., p. 100, Jany.—March, 1903.

"The reason" ("for the predominance of Southern views and ideals" at West Point) "runs back to several sources, one branch to the isolation of West Point." . . "The other deeper, more dangerous, procreative and far reaching to a text book on the Constitution by William Rawle of Philadelphia." . .

JAMES WILLIAM LATTA.

First Lieutenant 119th Pennsylvania Infantry, September 1, 1862; Captain March 4, 1864; discharged to accept staff appointment May 19, 1864.

Captain and Asst. Adjutant General U. S. Volunteers April 20, 1864; honorably mustered out January 20, 1866.

Second Lieutenant 6th U. S. Infantry February 7, 1867; declined February 18, 1867.

Brevetted Major U. S. Volunteers December 5, 1864, "for gallant and meritorious conduct at the battle of Winchester, Va., and for his habitual good conduct and deportment on all the battle-fields of the campaign before Richmond, Va.;" Lieut.-Colonel April 16, 1865, "for gallant and meritorious services in the cavalry battles of Ebenezer Church, Ala., and Columbus, Ga."

"Without qualification Rawle maintained" . . . "The secession of a state from the Union depends upon the will of the people of such state." Spirit of Old West Point, Genl. Morris Schaff, Boston, Mass., 1907.

This introduction to the Rawle citation is as it appeared in the July number of 1907 of the Atlantic Monthly where the work was first presented to the public as a serial. When it appeared in book form, the author had accepted two years as the life of Rawle at the Academy and had so altered his text that it there reads as follows:

"But there is another reason which seems to me to account more directly for its vitality at West Point in my time, I refer to the influence of a text book on the Constitution by William Rawle of Philadelphia."

(Virginia "his native state") "which in the exercise of its constitutional right, seceded from the Union on being invaded" . . .

"As a matter of fact, at the time that young Lee was attending the Military Academy at West Point, the text books, such as 'Rawle on the Constitution,' which were used there, taught with great distinctness the absolute right of a state to secede and the primary duty of every man to his native state."

Robert E. Lee. The Southerner. Thomas Nelson Page. 1908.

"We of the South have been wont to leave the writing of history mainly to others, and it is far from a complete excuse, that whilst others were writing history we were making it." . . .

"The reputation of the South has suffered because we have allowed rhetoric to usurp the place of history, we have furnished many orators but few historians, but all history must be the work not of the orator, but of the historian.". . *Idem.*

"When the Constitution was adopted by the votes of States at Philadelphia, and accepted by the votes of States in the popular conventions, it is safe to say there was not a man in the country from Washington and Hamilton on the one side to George Clinton and George Mason on the other who regarded the new system as anything but an experiment entered upon by the States and from which each and every State had the right peacefully to withdraw." Life of Daniel Webster—by Hon. Henry Cabot Lodge.

"Mr. Lodge fully concedes that when Webster replied to Hayne the popular idea of the Constitution was no longer that of an experiment from which the contracting parties had a right to withdraw, but that it had become the charter of a National Government." The Historical Conception of the U. S. Constitution and Union. Daniel H. Chamberlain. Proceedings Mass. Hist. Soc., second series, Vol XVI., p. 153, May 1902.

I. Rawle's Constitution Reviewed.

Mr. James Ford Rhodes, accredited as one of the five American writers of history who have written history with the significant scientific accuracy demanded by modern scholarship, in the opening chapter of his "History of the United States from the Compromise of 1850," in referring to the return to power of the Democratic Party under the leadership of Grover Cleveland, says: "For by that time the great questions which had their origin in the War had been settled as far as they could be by legislative and executive direction. Time only, the common arbitrator, could do the rest."

A "careless historical scholarship" is the blight of a people. Such a blight at one time fell upon this country with fateful effect. Much that was then said as conclusive of the right of a State to secede would have been left unsaid, if the public conscience had been set aright historically. The doctrine of secession exploded by gunpowder with all its attendant casualties, could have been as well then exploded by history as it has been since. History has apparently had no part in the settlement of the great questions of the War as perfected by "legislative and executive direction." Will her aid be helpful to "Time," "the common arbitrator," as he sets about his task to "do the rest." Her concise and conclusive judgment is to be found on the 52nd page of the first volume of the work of the eminent author last quoted, and is as follows:

"The justification alleged by the South for secession in 1861, was based on the principles enunciated by Calhoun, the cause was Slavery. Had there been no slavery, the Calhoun doctrine of the Constitution would never have been propounded, or, had it been, it would have been crushed beyond resurrection by Webster's speeches of 1830 and 1833 and by the prompt action of President Jackson. The South could not in 1861 justify her right of revolution, there had been no oppression, no invalidation of rights. She could not, however, proclaim to the civilized world what was true, that she went to war to extend slavery. Her defence therefor is that she made the contest for her constitutional rights, and this attempted vindication is founded on the Calhoun theory."

The Calhoun theory, as it will be remembered, was that the Constitution of 1787 was a compact or agreement between the several States, that it did not create a Nation, that the Union it established was a Union of States and not a Union of individuals, that the citizens of the several States were bound by it only through the act of the several States. Webster's speeches, on the contrary, familiar throughout the land for their splendid rhetoric, their convincing logic, their exalted patriotic perorations, are known in his works under the title, "The Constitution not a Compact between Sovereign States."

Every State has its problem to solve. The problem for this State was a federative government operative upon the individual. A federative Union between States began with the Achaen League and ended with the Confederation of 1777. A federative government acting directly on the citizen is purely an "American invention." It had its inception in the Constitution of 1787. A government that can command allegiance in peace and service in war; that can protect through its Courts and tax through its legislature; that can invoke its police power to preserve the public health; light its coast line; parcel its lands; regulate its commerce; construct its waterways for traffic; and build its dams for irrigation, is the only government ready to meet its initial guarantee of "life, liberty and the pursuit of happiness." It was this keynote of individuality that moved the founders when they abolished the Confederacy and established the Union. It was this keynote that escaped Calhoun, aroused Jackson and inspired Webster.

A new question, or if not a new question, at least appearing in a new phase, has recently been brought into prominence. It is not one of the great questions within the scope of settlement by "executive and legislative direction." "Time" may at sometime be helpful to its adjustment, but just now even as a "common arbitrator" it is probably beyond his jurisdiction. What is needed most at present is to set it right historically.

In 1825 William Rawle of Philadelphia published the first edition of his work "A View of the Constitution of the United States of America." It was copyrighted in January, and is said to have at once found its way to the Military Academy at West Point, as a text book. The question as to its presence there has been recently revived with considerable vigor, and as the book distinctly avows the right of a State to secede, it is asserted that the Government should consequently be answerable for the evil that may have followed the dissemination of the doctrine.

The "Commentaries on the Constitution of the United States of America" by Thomas McKean and James Wilson appeared in 1792, and Thomas Sergeant's "Constitutional Law:" "a view of the Practice and Jurisdiction of the Courts of the United States," in 1822, but Rawle's was probably the first work published adapted to collegiate and academic instruction. In 1820 John Taylor of Caroline, Virginia, issued his "Constitution Constructed and Constitution Vindicated." He followed it in 1823 with his "New Views of the Constitution of the United States," but his "Inquiry into the Principles of the Government of the United States" published 1814 had preceded both. Kent's first volume did not appear until 1826 and Story's not until 1833. Certainly if Taylor's radical secession views had ever been introduced into the academic course of a government institution, there would never have been atonement for the propagation of the evil. The subject is entitled to broader treatment than it has recently received at the hands of those who insist that Rawle's Constitution at one time had a place in the West Point curriculum.

So much stress has been put upon the "influence" of this book upon the "cadet mind;" so much weight given to the material evidence it is maintained that it supplies to justify secession; so much value placed upon its alleged unassailable and unqualified conclusions, that something should be made known of the author and his environments, and something be said that may the better interweave his secession text with his Union context. Mr. Rawle appears

here as the author, the teacher, not as an advocate, and it may be fairly assumed from the conclusions he draws, that he did not expect the right to secede to be invoked, simply because the right existed. Justification and cause must run concurrently, if the teachings he promulgates are to be rightly followed. Such undoubtedly, too, was the judgment of his cotemporaries. Any other view at this late day is but an effort to sustain a position inherently weak.

William Rawle (1759–1837) eminent in his profession, was among the Nation's foremost lawyers, and the recognized leader of his own Bar. The political outlawry of his parents,—his immediate relations and connections, were all adherents of the royal cause—induced him in his youth to visit England, where intended for the law, he entered as a student in the Middle Temple. His course there was brief. Upon his return, prompted by an earlier close of the Revolutionary struggles than he had anticipated, he resumed his legal studies in his native city and followed his profession there until the end of his life.

A biographer has said of him, "A deep and abiding sense of filial duty estranged him for a time from his native country; but when he was enabled consistently, with that (to him) paramount sentiment, to return and take his place as a member of the new community, he became with sincerity and earnestness, in heart as well as in fact, a republican citizen." He was chosen a member of the Legislature to represent Philadelphia at the General Election in 1789. "This was his first and last appearance on the stage of political life." The only public place he ever held was that of District Attorney of the United States for the District of Pennsylvania, "conferred upon him without solicitation," and from this office he voluntarily retired after some nine years of service. He was content with the distinctions of professional life, declining all other offers of public preferment, notably that of Presiding Judge of the District Court of his County. The position was twice tendered him. He was a member of the American Philosophical Society and Chancellor of the Law Association.

The author of numerous addresses and pamphlets, aside from his contributions to the law, he was well known at the time and has apparently been more widely known since, from his text book on the Constitution. It passed through three editions, and was to be found as a text book in several of the leading institutions of learning of that day. When, however, it has been recently quoted, it has been only with a few brief sentences on the right of a State to secede. Obsolete as to its conclusions on the question of secession, the work has been long out of print, is not readily accessible, and is rarely found outside the Libraries. The author cannot be fairly understood without a fuller exposition than recent writers have supplied, of the theories from which he deduced his conclusions on the obligations to the Union and the right to withdraw from it, theories based on premises decidedly different from those of other commentators, who have reached the same conclusion as he has on the question of secession. A more extended review will afford the opportunity for a better understanding.

There is a striking contrast between the "introduction" and conclusion, between the opening and closing chapter. In the one the author proclaims the supremacy of the Nation, the unification of the people, a paramount allegiance. In the other he cautions the reader that the doctrine of the "indefeasible nature of personal allegiance," "not expressed but mutually understood," "heretofore presented" "must be so far qualified in respect to allegiance to the United States" as to permit its withdrawal when the State shall withdraw. In the intervening

twenty-nine chapters there is no indication that such a reservation is likely to follow except that it may be so construed from the observation that it is "competent for a State to make a compact with its citizens that the reciprocal obligations of protection and allegiance might cease in certain events."

It is necessary to quote liberally from the early pages, that an opportunity may be afforded to judge whether his reader, even if the author did not so consider it, would not be wholly justified in concluding that the Constitution makers had succeeded in constructing a government that did not inherently provide for its own destruction, though it is by some still assumed, that such was not their purpose. The following extracts are submitted in support of this conclusion.

"The history of man does not present a more illustrious monument of human invention, sound principles, and judicious combinations than the Constitution of the United States." . . .

"It was the act of many independent States, though in a greater degree the act of the people set in motion by those States; it was the act of the people of each State, not of the people at large." . . .

"The Constitution thus became the result of a liberal and noble sacrifice of partial and inferior interests, to the general good, and the people formed into one mass as citizens of the Union yet still remaining distinct as citizens of the different States created a new government without destroying those which existed before; reserving in the latter what they did not surrender to the former, and in the very act of retaining part, conferring power and dignity on the whole." . .

"The people of the States unite with each other without destroying their previous organization." . . .

"The obligations of duty and allegiance to them (the States) are not impaired; but in those instances, which are within the sphere of the general government, the higher obligations of allegiance and duty to it supersede what was due to the State governments because from the very nature of the case they cannot be co-equal. Two governments of concurrent right and power cannot exist in one society. Superiority must therefore be conferred on the general government, or its formation instead of promoting domestic tranquillity would produce perpetual discord and disorder." . . .

"As therefore it (the State) is neither a stranger, nor properly speaking a *confederate*, it seems to follow it must be considered as part of the greater nation, a term which in the course of this work we shall chiefly use in reference to the United States, because although every political body governed by its own laws or internal regulations may be denominated a Nation, yet States not possessing that absolute independence cannot with full propriety be so designated." . .

"By construction we can only mean the ascertaining of the meaning of an instrument or other form of words and by this rule alone ought we to be governed in respect to this constitution. . . The true rule therefore seems to be no other than that which is applied in all cases of impartial and correct exposition; which is to deduce the meaning from its known intention and its entire text, and to give effect if possible to every part of it consistent with the unity and harmony of the whole." . . .

"In many respects we have the benefit of the learned elucidation of judicial tribunals and wherever the Supreme Court of the United States has pronounced its solemn decision upon Constitutional points, the author has gladly availed himself of the irrefragable authority, but where a guide so certain cannot be

found, recourse can only be had to anxious and serious endeavor to display and expound with truth and justice the main feature of a constitution which must always be more admired as it is more considered and better understood." . . .

The Nationalist need ask no firmer support, or look farther for more convincing speech, than he will find here. Nor need a faculty seek a better assurance, so far as preparatory presentation can supply it, that the book might safely be trusted to teach "an indestructible Union of indestructible States."

The first chapter begins with the "Preamble" recited in the author's own way. "The government formed under the appellation of the United States of America is declared in the solemn instrument which is denominated the Constitution to be," "ordained and established by the people of the United States in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to themselves and their posterity." While he quotes it, it is not quoted. The "we" before "the people" is omitted and as it reads here, it is rather as that they the people did, instead of as in the original that "we the people" do. The material strength of the phrase is that it imports action. Its force is lost when it is rendered as of the past, not of the present. The conclusion "this Constitution of the United States of America" as it had been previously made to appear, reconstructed in the author's language, is not re-quoted in its own.

Again in Appendix IV, appears the whole Constitution with the Preamble omitted, notwithstanding that announcement is made that "For the purpose of convenient reference the *entire Constitution is here inserted*, including the amendments."

The omission of the Preamble and particularly the phrase "We the people of the United States" is the more conspicious, for about this clause, considered by the "founders" as conclusive for cohesion, has waged the contest between a "Nation" and a "compact". These omissions, not otherwise supplied, is the more significant when it is recalled that the author in discussing his crucial point in his theory of secession says "Not a word in the Constitution is intended to be inoperative." Significant too when it is remembered that an effective solution of intention is often more readily found in a Preamble than in the text. The clause therefore is of material import and so it has been treated by all other commentators. The Supreme Court had already ruled that the whole people of the United States were as well a party to concurrence in the adoption of the Constitution, as were the States, and the people of the States.

There is nothing in the two hundred and fifty pages that follow to divert the reader's attention from a cohesive Union until the apparition of secession suddenly confronts him in the thirty-first and concluding chapter. Its compromising title "Of the Union" may not be as paradoxical as it would seem, when the author's sentiments for and his conclusions against the Union are closely considered.

Recent writers have only sought to know Rawle's views on the question of secession, not whence he derived them or why he held them; hence, as has been said, when he has been cited, he has been but meagrely quoted. His doctrine, sound in the abstract as to the right of an independent State to change its form of government, when the people so willed, is maintained, wholly regardless of the obligations imposed by an interdependence. Other writers who uphold the doctrine of secession do not seem to have placed their dependence upon

this conceded right of the absolutely independent State. As so much reliance is placed on the "Guarantee" clause of the Constitution, where alone the subject of secession is treated, it will be better understood if its treatment there be fully quoted.

"Having thus endeavored," as the chapter begins, "to delineate the general features of this peculiar and invaluable form of government, we shall conclude with adverting to the principles of its cohesion and to the provisions it contains for its own duration and extension."

"This subject cannot be better understood than by presenting in its own words an emphatical clause of the Constitution." (Art. IV, Sec. 4.)

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on the application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic violence."

"The Union is an association of the people of republics; its preservation is calculated to depend on the preservation of those republics. The people of each pledge themselves to preserve that form of government in all. Thus each becomes responsible to the rest that no other form of government shall prevail in it; and all are bound to preserve it in every one. But the mere compact without the power to enforce it would be of little value. Now this power can nowhere be so properly lodged as in the Union itself. Hence the term guarantee indicates that the United States are authorized to oppose and if possible prevent every State in the Union from relinquishing the republican form of government. And as an auxiliary means they are expressly authorized and required to employ their force on the application of the constituted authorities of each State, 'to repress domestic violence.' If a faction should attempt to subvert the government of a State for the purpose of destroying its republican form the paternal power of the Union could thus be called forth to subdue it. Yet it is not to be understood that its interposition would be justifiable if the people of a State should determine to retire from the Union, whether they adopted another or retained the same form of government, or if they should with the express intention of seceding, expunge the representative system from their code, and thereby incapacitate themselves from concurring according to the mode now presented in the choice of certain public officers of the United States."

"The principle of representation although certainly the wisest and the best is not essential to the being of a Republic and therefore the guarantee must be construed."

"It depends upon the State itself to retain or abolish the principle of representation, because it depends upon itself whether it will continue a member of the Union. To deny this right would be inconsistent with the principles upon which our political systems are founded, and which is, that the people have in all cases a right to determine how they will be governed. This right must be considered as an ingredient in the original composition of the general government, *which though not expressed was mutually understood*, and the doctrine heretofore presented to the reader, in regard to the indefeasible nature of personal allegiance is so far qualified in respect to allegiance to the United States. It was observed that it was competent for a State to make a compact with its citizens that the reciprocal obligations of protection and allegiance might cease in certain events, and it was further observed that allegiance would necessarily cease on the dissolution of the society to which it was due."

"In what manner this guarantee shall be effectuated is not explained, and it presents a question of considerable nicety and importance."

"Not a word in the Constitution is intended to be inoperative and one so significant as the present was not lightly inserted. The United States are therefore bound to carry it into effect whenever the occasion arises, and finding as we do in the same clause the engagement to protect each State against domestic violence, which can only be by the arms of the Union, we are assisted in a due construction of the means of enforcing the guarantee. If a majority of the people of a State deliberately and peacefully resolve to relinquish the republican form of government, they cease to be members of the Union. If a faction, an inferior number, make such an effort and endeavor to enforce it by violence the case provided for will have arisen and the Union is bound to employ its power to prevent it."

Nothing more is said of whence comes the authority for or wherein lays the power to effectuate a secession. Comment is made on the present methods necessary to accomplish it; the serious consequences likely to follow should it be accomplished; and the chapter closing with a strong appeal for the Union, calls for the avoidance of those who would seek to dissolve it as one would avoid "the thrust of the assassin."

"The secession of a State from the Union depends upon the will of the people of such State." . . .

"But in any manner in which secession is to take place, nothing is more certain than that the act should be deliberate, clear, and unequivocal." . . . .

"Still, however, the secession must in such case be distinctly and peremptorily declared to take place on that event"—the failure on an attempted reconciliation—"and in such case, as in the case of an unconditional secession, the previous ligament with the Union would be legitimately and fairly destroyed. But in either case the people is the only moving power." . . . .

"In the present Constitution there is no specification of numbers after the first formation It was foreseen that there would be a natural tendency to increase the number of States with the increase of population then anticipated and now so fully verified. *It was also known though it was not avowed* that a State might withdraw itself. The number would therefore be variable." . . .

"The consequences of an absolute secession cannot be mistaken and they would be serious and afflicting."

"To withdraw from the Union is a solemn serious act. Whenever it may appear expedient to the people of a state, it must be manifested in a direct and unequivocal manner." . . .

And the following among his closing sentences, is one of the author's tributes to the Union:

"In every respect, therefore, which this great subject presents, we feel the deepest impression of a sacred obligation to preserve the Union of our country, we feel our glory, our safety, our happiness involved in it; we unite the interests of those who coldly calculate the advantages, with those who glow with what is a little short of filial affection; and we must resist the attempt of its own citizens to destroy it with the same feelings that we should avert the dagger of the parricide."

Mr. Rawle's cotemporaries had no support for or sympathy with his secession doctrines; on the contrary they were seemingly disposed to deliberately suppress

them. Mr. Thomas I. Wharton, himself a leader of the Bar, in a memorial address delivered before the Pennsylvania Historical Society, shortly after Mr. Rawle's decease, after briefly summarizing the various subjects of which the author treats, with no hint at his doctrine of secession, closes the paragraph with this impressive reference of his tribute to the Union:

"The volume concludes with a chapter on the blessings and benefits of the Union, and of that invaluable constitution by which those blessings and benefits are secured, and it is to be hoped perpetuated; and the author finishes his work with a quotation from the farewell address of that illustrious man," "whose character," he remarks, "stamps inestimable value on all that he has uttered, and whose exhortations on this subject, springing from the purest patriotism and the soundest wisdom, ought never to be forgotten or neglected."

Our author seems to have been moved rather by the hard logic of his legal conclusions, than by the deep and abiding conclusions he had of the "blessings and benefits secured by the Union."

If the guarantee clause was sufficient then the constitution secured to the States that inherent right of a Sovereign State to change its form of government as the people willed; if it was not sufficient or was not so intended then the obligations imposed by the Union of the States and the people of the States with themselves and with each other so abrogated that ingredient of sovereignty, of independence in each State, that if it sought to change its form of government or its relations with its fellows, it must secure the consent of all the other States.

According to Rawle's construction of this "emphatical clause," it guaranteed not only to protect the State in its republican form of government, but it guaranteed to permit the State to retain every right, immunity and privilege incident to a republican State. It guaranteed not only to protect it with all its force against offenders against its integrity while it was within the Union, but it guaranteed also as "was known but not avowed" not to molest it, if it decided to destroy itself as an integral part of the Union.

The guarantee that a State might withdraw from the Union whether it retained its same form of government or adopted another, when a majority so willed, as "was mutually understood," "was an ingredient in the original composition of the general government." But is was not claimed to be understood that this ingredient also included a guarantee that would protect the State from the attempt of a faction to subvert its government. The rights and obligations of State to Nation and Nation to State, of allegiance to one and protection from the other, were to be reciprocal, whether inherent or conferred. And the "Arms of the Union" might therefore be employed as well against domestic violence as to suppress a faction and so protect the State should a "faction or lesser number" make an "effort or endeavor" to accomplish by force what a majority might do peacefully.

If Rawle was right he made a better case for secession than secession ever made for itself. But no secession ever accepted him, except as a make weight, and it is a manifest weakness to urge him as a factor now, when he can serve no purpose, when they refused to receive him then, when he could. No text writer of note cites Rawle's secession views authoritively, only one of its leading defenders cites him at all.

Rawle found his strength within the four corners of the constitution and there he made the "greater" Nation in its integrity preserve and care for the dignity and privilege of the "lesser" Nation in its. He kept that great instrument,

which he was so wont to extol, above and beyond the sordid commercial construction of compact, bargain, agreement. The two constructions are far apart. They cannot be made to meet here. If a state be permitted to withdraw from a compact it would not be expected that a compact only possessed the strength to enforce its own guarantee, nor indeed would such a guarantee be needed. The West Point cadet who learned his secession from Rawle would have to unlearn it when he took it from Jefferson Davis.

In seeking for the meaning or intention in construing a statute or ordinance, it has never been considered that a prevailing public opinion of the time of the language of debate in convention or assembly is a safe guide; the text itself is the only sure reliance. Indeed it has been expressly ruled that speech in Assembly has no place in judicial construction; that what may be said by the few who speak may not be the thoughts of the many who vote. Cotemporaneous opinion, it is true, may be sought to aid construction under certain conditions, but then it must be well established. "It can never abrogate the text, it can never fritter away the obvious sense." A vote under a misapprehension can only be corrected before announcement. An individual may be misled; can a whole community be so deceived, that the privilege of the misapprehending voter must be made operative indefinitely. The American people generally know what they want and how to get it.

Hence Mr. Rawle's "though not expressed it was mutually understood" and "it was known but not avowed" that a State might withdraw itself is fairly open to criticism. A mutual understanding concerning a written instrument, may mean either of two things to alter, amend, or interpret, or to so destroy the sense by the interjection of new matter as to nullify it entirely. Mutual understanding and cotemporaneous opinion are apparently treated here as synonymous. Mutual understanding, a much more conclusive term, demands however the more exact demonstration. The whole people were a party to the agreement, and what was the understanding of one, if it was to be mutual, must have been the understanding of the other. Unless the whole people were like minded the understanding fails in that essential mutuality, without which it could serve no purpose.

This is the more significant, as special stress is laid upon these phrases "mutual understanding" and "known but not avowed" by Alexander H. Stephens in his "War Between the States," the leading secession writer, who though apparently not fully in accord with Rawle quotes him freely. He thus incorporates some four pages of Rawle's matter into four pages of his, and decidedly intimates that though he does not concur with him wholly in his text, he does agree with him logically in his conclusion. And in this logical concurrence he says, "As he (Rawle) was a living actor in the scenes," these phrases become of special moment.

A mutual understanding not expressed or a fact known but not avowed discloses a weak case, weaker, when the issue involves the construction of a written instrument. But if it can be shown that there was no such understanding and never such an avowal, then it would seem that there was no case at all. As "a living actor in the scenes" Mr. Rawle may have been of avail as an authority, certainly he was of no service as a witness.

The campaign for ratification was a bitter political contest, strife waxed warm, angry contention never ceased. A recent commentator has cogently said, "While

the Constitution was before the people awaiting their approval the friends and partizans of the State Sovereignty theory marshalled their forces and attacked it with a virulence and malignity of which we can now hardly form a conception." If cotemporaneous opinion is the highest authority and facts disclosed in that contest are the best evidence, neither Rawle nor Stephens seem to have followed the testimony, nor do they seem either to have fully apprehended what the judgment of the majority then rendered meant. What was the testimony? What were the pleadings? Who tried the case? Who found the facts? What was the judgment?

The Constitutional Convention framed the issue and opened its case for a "consolidated Union", and so declared unequivocally in its letter to Congress transmitting the Constitution for submission to the country, as follows: "In all our deliberations we kept steadily in our view that which appears to us of the greatest interest of every true American—the *consolidation of our Union* in which is involved our prosperity, felicity, safety, perhaps our *national* existence. This *important consideration* seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of *inferior magnitude*, than might have been otherwise expected; and thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession, which the peculiarity of our political situation rendered indispensable." (A)

IN CONVENTION, Monday, September 17th, 1787.

(A) Present, The States of New-Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New-York, New-Jersey, Pennsylvania, Delaware, Maryland. Virginia, North Carolina, South Carolina, and Georgia.

Resolved, That the preceding constitution be laid before the United States in congress assembled, and that it is the opinion of this convention, that it should afterwards be submitted to a convention of delegates chosen in each state *by the people thereof*, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to, and ratifying the same, should give notice thereof to the United States in congress assembled.

. . . . . .

By the unanimous order of the convention.

GO: WASHINGTON,
President.

WILLIAM JACKSON,
Secretary.

IN CONVENTION, September 17th, 1787.

SIR, We have now the honor to submit to the consideration of the United States in congress assembled, that constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired, that the power of making war, peace and treaties; that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the union; but the impropriety of delegating such extensive trusts to one body of men is evident. Hence results the necessity of a different organization.

It is obviously impracticable, in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all; individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several states as to their situation, extent, habits and particular interests.

Prof. St. George Tucker in his disquisition on the Constitution appearing as an appendix to his Blackstone's Commentaries, perhaps the earliest published (1803) from a State Sovereignty source, stated that the Convention had created a "Confederate Republic;" the Convention itself had distinctly avowed that it had established a "consolidated union" for a "national existence."

The word consolidate was well known and well understood at the time. It had a distinctive political significance. It meant to the public just what the lexicographer defines it to mean, "To combine into one body or system; form a union of." It is a very antithesis to confederate; "associated in a league compact or confederacy; allied by compact or agreement."

The following instances will exemplify its application, John Taylor in his "Prefatory note" to his "New views of the Constitution of the United States" (supra) says "that many eminent and respectable men have ever preferred and ever will prefer a *consolidated national government* to our federal system;"

In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the convention to be less rigid on points of inferior magnitude, than might have been otherwise expected; and thus the constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every state is not perhaps to be expected; but each will doubtless consider, that had her interests alone been consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and believe, that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish. With great respect, we have the honor to be, sir, your excellency's most obedient and humble servants.

GO: WASHINGTON,
President.

By unanimous order of the convention.
His excellency the President of Congress.

THE UNITED STATES, IN CONGRESS ASSEMBLED,

Friday, Sept. 28th, 1787.

Present—New-Hampshire, Massachusetts, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, and Georgia, and from Maryland, Mr. Ross.

Congress having received the report of the convention lately assembled in Philadelphia:

Resolved unanimously, That the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures, in order to submit to a convention of delegates, chosen in each state *by the people thereof*, in conformity of the resolves of the convention, made and provided in that case.

CHARLES THOMPSON,
Secretary.

(Secret Proceedings and Debates of the Federal Convention Assembled at Philadelphia in the Year 1787 for the Purpose of Forming the Constitution of the United States of America . . Senate Document No. 728. Sixtieth Congress Second Session . . . Washington Government Printing Office 1909 . . . First Printed at Albany by Websters and Skinners 1821, page 180 et seq.)

"that the constitution under the influence of this predilection, has been erroneously construed; that these constructions are rapidly advancing towards their end, whether it shall be *consolidation* or *disunion*; that they will become a source of geographical discord; and that the happiness and prosperity of the United States will be greater under a federal than under a *national* government in any form are the opinions which have suggested the following treaties."

And Jefferson Davis in a letter, which will later appear in full, referring to Chancellor Kent, said: "Though not so decided on the point of State Sovereignty was very far in advance of the *consolidationists* of our time."

The case proceeded under the pleadings. There was no formal answer. The Convention's "statement" received early consideration in Pennsylvania; she was the second state to ratify. It was said her convention devoted five days out of a three weeks' session to determine the meanings of the words "annihilate" and "consolidate." The result clearly demonstrated that their meaning was thoroughly understood. A decisive majority voted for a "consolidated Union" and against "annihilation," the necessary result of the anarchy which it was predicted would follow a failure to ratify.

The issue was clearly defined by a delegate—Findlay—who contended that "the proposed plan amounted to a consolidation and not a confederation of States." "In the Preamble it is said," he continued—"'*We the people*' and not *We the States*, which therefore is a compact between individuals entering into society and not between separate States enjoying independent power."

James Wilson, great lawyer, eminent jurist, a leader in the Constitutional Convention, championed in his home state, as he had done there, the cause of the consolidated union. The day before the final vote was taken he spoke earnestly in the Pennsylvania convention for a national existence.

"This system is not a compact; I cannot discern the least trace of a compact; the introduction to the work is not an unmeaning flourish. The system tells you what it is;—an ordinance, an establishment of the people."

Patrick Henry was an anti-consolidationist, not for a national existence, a state sovereignty advocate. He conceded Wilson's conclusions, and eloquently argued his own case in the Virginia anti-ratification canvas from Wilson's premises.

"The Constitution is the severance of the Confederacy. Its language 'We the people' is the institution of one great consolidated national government of the people of all the States instead of a government by compact with the States for its agent. The people gave the Convention no power to use their name."

This one conclusion given the same effect by two adverse advocates, one the great lawyer, the other the "man eloquent," is certainly not helpful to a mutual understanding and known but not avowed concession, of a right to secede. Neither can there be better evidence, than is here supplied, of the trend of cotemporaneous opinion More than this, these thoughts, this conclusion, almost the very language, has been woven into every opinion of the Supreme Court of the United States where the question here raised has been submitted for decision.

Randolph—in the Federal Convention against, in the Virginia Convention for the Constitution—answered Henry for the Unionist—"The question is now between union and no union and I should sooner lop off my right arm than consent to a dissolution of the union."

Pendleton then followed for "this government" and against a Confederacy.

"Who but the people can delegate powers or have a right to form government? There is no quarrel between government and liberty, the former is the shield and protection of the latter. The question must be between this government and the Confederacy, which is no government at all. This is to be a government of laws and not of men."

Madison's explanation of a "consolidated union" interwove the two governments, National and State, indissolubly, "That the Constitution is in part a consolidated union, and part rests so completely on the States that its life is bound up in theirs."

And Mason's demonstration was conclusive that the inherent cohesive strength of the instrument was the moving cause of the demand for its rejection. "This paper (that is the Constitution)" said he in his place in the Virginia convention, "will be the great charter of America, it will be paramount to everything. After having once consented to it, we cannot recede from it."

Robert Yates, afterwards Chief Justice of the State, and John Lansing, Jun., the two delegates from New York who withdrew from the Convention, submitted a joint letter to Governor Clinton "containing their reasons for not subscribing to the Federal Constitution." Of these reasons the following are pertinent and material to the issue here framed.

. . . "Thus circumstanced, under these impressions, to have hesitated would have been to be culpable; we, therefore, gave the *principles of the Constitution*, which has received the sanction of a majority of the convention, our *decided* and *unreserved dissent;* but we must candidly confess, that we should have been *equally opposed to any system, however modified*, which had in object the *consolidation of the United States into one government.*" . . . 2d. A conviction of the *impracticability* of *establishing* a *general government*, pervading every part of the United States, and extending essential benefits to all. . . . . ." From these expressions, we were led to believe that a system of consolidated *government* could not in the remotest degree have been in contemplation of the legislature of this state? for that so important a trust, as the adopting measures which tended to deprive the state *government* of its most *essential rights* of *sovereignty*, and to place it in a *dependent situation*, could not have been confided by *implication;*" . . . . . ."These reasons were, in our opinion, conclusive against any system of *consolidated government:* to that *recommended* by the *convention*, we suppose most of them very *forcibly apply.*"

Madison was the principal author, and Hamilton, although it was not altogether to his liking, the strongest advocate of the Constitution. New York's Convention was threatened with dissolution. It was determined on a conditional ratification based upon a proviso of a right to withdraw, if the amendments it proposed should subsequently fail of adoption. Hamilton well knew an absolute ratification only would avail. He sought to strengthen his own views and appealed to Madison. Madison's reply was "prompt and decisive."

"Yours of yesterday is this moment come to hand and I have but a few moments to answer it. I am sorry that your situation obliges you to listen to propositions of the nature you describe. My opinion is that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitution within a certain time, is a conditional ratification; that it does not make New York a member of the new Union and consequently that she

could not be received on that plan. Compacts must be reciprocal—this principle could not in such case be preserved. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by other States. An adoption for a limited time would be as ineffective as an adoption of some articles only. In short any condition whatever must vitiate the ratification."

This silenced the leaders of the opposition and New York's unconditional ratification followed.

When Webster in 1833 delivered his great speech on the Constitution not a compact, in reply to Calhoun, Madison, then in his eighty-third year, in a letter of congratulation, agreed with him in the view he had taken of the nature of the government established by the Constitution; thus reiterating and confirming as the "greatest living authority," what he had said as the highest authority when the Constitution was yet scarce in its infancy.

Virginia, where Madison was at home, preserving the sequence from the Declaration of Independence, that where government becomes destructive of the rights it was intended to secure, the people may abolish it and institute another, emphatically, without impairing its validity, so declared in her ordinance of adoption as follows:

"We the *Delegates* of the *people* of *Virginia* duly elected in pursuance of a recommendation from the *General Assembly* and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and being prepared as well as the most mature deliberation hath enabled us to decide thereon,—*Do* in the *name* and on *behalf* of the *people* of *Virginia* declare and make known that the powers granted under the Constitution being derived from the *people* of the *United States may be resumed by them whenever the same shall be perverted to their injury or oppression.*" . . . . .

(The entire ordinance quoted in full from Elliott's Debates, Vol. I., p. 327, may be found in Alexander H. Stephens' War Between the States, Vol. I., p. 254, with that author's comments.)

Thus traced from the earliest creed of our liberties, the right of secession at will is denounced, the right of revolution for a just cause upheld, the one a Nation destroyer, the other a Nation builder, always existing, ever inherent, never denied.

In Massachusetts the issue was fully comprehended. Samuel Adams, upon whose consent alone ratification hinged, said "he was startled when on entering the 'new building' he met with a national government instead of a federal union of sovereign states." And "Nason of Maine stubbornly refused to support a constitution which destroyed the sovereignty of states."

In Maryland Luther Martin, foremost among the great lawyers of the country, in addressing the House of Delegates in compliance with its resolution requesting him "to give information with regard to the proceedings of the late convention," exhaustively reviewed its debates, discussions and conclusions, gave his reasons as a delegate for withholding his signature to the Constitution it adopted, and strenuously voiced his opinion against the "National government" it created and for the "State governments" it weakened.

"It is" (he said) "in its very *introduction* declared to be a compact between the *people* of the United States *as individuals*, and it is to be *ratified* by the *people* at large in their capacity as individuals;—all of which it was said would be quite right and proper, if there were *no State governments*, if *all the people* of this continent were in a state of *nature* and we were forming one *national*

government for them *as individuals;* and is nearly the same as was done in most of the States when they formed the government over the people who composed them."

. . . "That the representation instead of being drawn from the *people at large* as *individuals*, ought to be drawn from the *states* as *states* in their *sovereign* capacity—That in a *federal* government, the *parties* to the compact are not the *people* as *individuals*, but the *states* as *states*, and that it is by the *states* as *states* in their *sovereign* capacity, that the system of government ought to be *ratified*, and not by the *people* as *individuals*." . . . .

He also said, referring to the creation and erection of United States Courts to interpret and determine the law, that as the "new government" would be paramount in all its branches, when it went into operation, "whether any laws or regulations of Congress, or any acts of its president or other officers, were contrary to or not warranted by the Constitution, would rest only with judges appointed by Congress and by whose determination every State must be bound."

It was claimed by Elbridge Gerry, the non-joining member of the Convention from Massachusetts, that the clause permitting amendments by Congress with the concurrence of three-fourths of the States "was radically unsound and fraught with dangerous consequences;" that thereby the powers of the States might be materially minimized or the rights of the general government largely increased; or the Union bound to such innovations as would subvert the State constitutions altogether. The non-concurring States must yield or revolution and insurrection follow unless the other States should consent to a withdrawal. The force of the reasoning, declaring the Constitution of the United States paramount and the State Constitutions subordinate, was recognized and accepted by the Convention, the only reply coming from Hamilton, who said there was no greater evil in subjecting the people of the United States to the majority than the people of a particular State.

The case closed. It had gone to the people under the pleadings, on the facts, and under the authorities. The judgment of the majority was rendered for a Consolidated Union and a National existence, and against a compact of Sovereign States, and that judgment has never been reversed.

Of the efforts made to reverse it, the following extract from "Pomeroy on the Constitution" fittingly applies:

. . . "The assumed privilege of seceding from the Union" (was pronounced) "a political heresy of the deepest dye" . . . "Baffled in the legislature and the Courts it finally sought the field; and as it appealed to the sword may not American citizens in all portions of our common country unite in the devout hope that it has perished by the sword." . .

From what source do the believers in this mutual understanding, this cotemporaneous opinion, this known but not avowed right of secession, derive their knowledge. It must be from one not readily accessible to the general reader. Is it the whisperings of tradition, or was it "in the air?" It cannot be from cotemporary literature. The Federalist, that powerful auxiliary to ratification, was edited by Madison and Hamilton, with occasional contributions from Jay. The debates in the Convention do not disclose it nor do the discussions that followed reveal it; rather indeed, as has been shown, do they clearly establish a contrary conviction. The proposed amendments, to be submitted

for future action, gave no hint that a right of withdrawal, whether provided for or understood, had aught to do with a hesitancy to ratify. Their tendency, instead, was to make the general government more conspicuously operative on the individual.

The masses, where the bitterest opposition was developed, were moved largely by passion and prejudice and the everpresent besom of a dominant aristocracy. The surrender of local influence and local power was made as an unwilling sacrifice. Any form that contracted, curtailed, or diminished the power of the State was equally offensive. The thrifty and better educated generally gave their united support to the "new government," and it is scarcely fair criticism to assail their intelligence with a conclusion that they did not know what they were about.

This question is definitely disposed of in Hare's American Constitutional Law (1889), Vol. I, page 78 in a single paragraph.

"They who contend that although the right of secession was not conferred in terms, it was necessarily implied, and was so understood at the time, have to meet two difficulties,—first, how a government which was to be a mere agency that might be terminated at any moment should have been regarded with so much expectation by one party and so much apprehension by the other; and next, why, if such a right was desirable in the opinion of the delegates, and would have been sanctioned by the popular judgment, it was not expressly given in the body of the instrument, or by amendments which were made soon afterwards in accordance with the general wish. These considerations would seem to be decisive. So far from the constitution having been adopted in the belief that the States might secede at pleasure, such provision would have been viewed with universal disfavor, as tending to perpetuate a danger against which all parties sedulously desired to guard and would have insured the rejection of any plan of which it was expressly or impliedly a part."

Judge J. I. Clark Hare was of the same Bar, and of the next generation after Rawle. He was as eminent as a jurist as Rawle was distinguished as a lawyer. He was upwards of forty years on the Bench, repeatedly re-elected regardless of party in a community where the lines were rigidly drawn. His opinions were rarely questioned, and but infrequently disturbed by appellate authority Through all this long career, he had the unbroken confidence of the profession and the continued respect and esteem of his fellow citizens. He was an author of high repute, profound learning, close application, and constant study. For thirty-six years he held Professorships—The Institutes of Law and Constitutional Law—in the University of Pennsylvania.

Ridicule, raillery, and abuse were favorite weapons. In Massachusetts, where the town meeting idea was so deeply imbedded and where the silence of Samuel Adams so long kept ratification in jeopardy, the prosperous, the well to do, and the educated, the lawyer, the Judge, and the ruler were traduced and maligned in unbecoming and unseemly speech.

In Virginia Patrick Henry fell into a facetious strain, so belittling statehood under the "new government" that he helped rather than hindered the masterly efforts of Madison, Randolph and Marshall.

In Pennsylvania Wilson was Scotch Jimmy, James de Caledonia, Madison a boy, and Franklin in his dotage. The five days devoted to debate in the Convention on the meaning of words with which every member should have been familiar, it was charged was a useless waste of the public time. One delegate it was said spoke for nine hours continuously

J. P. Gordy, a recognized authority, in his "Political Parties in the United States" says: "The convention framed a constitution by the adoption of which thirteen peoples imagining themselves independent and sovereign, really acknowledged themselves to be but parts of a single political whole. But they made this acknowledgment unconsciously. They continued to think of themselves as sovereigns, who indeed permitted an agent to exercise some of their functions for them, but who had not abdicated their thrones."

Rawle, the "living actor in the scenes" and Gordy, the later writer, are of divergent views, Gordy's conclusion is that the constitution makers builded stronger than they knew; Rawle's implication is of a concealed structural weakness, which though known it was deemed wiser not to avow.

And again, still from Gordy: "If the constitution had contained a definite statement of the actual fact; if it had said that to adopt it was to acknowledge the sovereignty of the one American people, no part of which could sever its connections from the rest without the consent of the whole, it would probably have been rejected by every State in the Union."

Gordy conceding "the actual fact" that the founders had made a cohesive Union, discloses the impossibility of his suppository proposition as explicitly as does Bancroft who in his "History of the Constitution of the United States," says "The Constitution is to the American people a possession for all ages, it creates an indissoluble Union of imperishable States."

Modern scholarship demands from scientific research the whole truth. It will accept no other conclusion. Until the whole truth has been ascertained science does not reveal or disclose a definite result. History is a science. Its investigations are pursued as thoroughly as are those of the other sciences, with equal, if not better opportunities. It is submitted that the conclusion that "thirteen peoples," when they adopted the Constitution, made "unconscious" acknowledgment that they were "but parts of the whole," and the further deduction, that if the Constitution had contained a definite statement "that its adoption" "acknowledged the sovereignty of the one American people." . . "it would have been rejected by every State in the Union," are neither founded upon the exacting requirements demanded by modern scholarship, nor do they disclose the whole truth. (B)

Besides, confirmation of this "actual fact" and of the creation of this "indissoluble union" comes from the most formidable adversary the country ever

---

(B) It is singular but can hardly be deemed surprising that the political descendants of the men who in 1787 could see nothing federal in the Constitution, and based their objection to it on the ground that it merged the States in a consolidated government, should be convinced that this view was erroneous, and that the government of the United States is a mere compact or alliance that may be dissolved at pleasure. The Constitution, as delineated by Luther Martin, Patrick Henry, Lansing and the other opponents of the measure in the last century, stands in such marked contrast to the doctrine of Calhoun and his disciples in this, that it would be inconceivable that men so much alike could put such different interpretations on the same instrument, were it not obvious that the sentiment of uncompromising hostility, which prompted the allegation that the new government would be absolute, led to the denial of its sovereignty after it had been established with a view to effect its overthrow. These extreme views refute each other, and need only be thrown into the same crucible to evolve the truth that within the scope of their powers the United States are as sovereign as Parliament, although a wide field of usefulness lies open beyond these limits to the States —Hare's American Constitutional Law, Vol I, page 67.

had, the Confederate States of America. The Constitution of the Confederate States was practically a transcript of the Constitution of the United States except where the new conditions required a change. The Confederacy failed in the very initiative of its undertaking to justify itself. The States that composed the Confederacy had withdrawn from the American Union because of a desire, and in the exercise of an alleged Constitutional right to secede. This right was denied for the reason that the Constitution of the United States in its Preamble: "We the people of the United States in order to form a more perfect Union;" effectually created and established a cohesive, imperishable, and indissoluble Union. That this Preamble had fully accomplished its purpose was subsequently conceded by the Confederate States themselves.

Created by secession and organized for secession the Preamble to their Constitution declared with significant potency, that: "We the people of the Confederate States, *each State acting* in *its sovereign and independent character*, in order to form a permanent federal government do ordain and establish this Constitution for the Confederate States of America." This Constitution adopted by the unanimous vote of all the Deputies from the States, was known as the permanent Constitution following one of a provisional nature in operation until the Confederacy had assumed its full proportions. The Preamble of the provisional Constitution, "We the *Deputies of the sovereign and independent States* of " . . . "do hereby in *behalf of these States*," was more conspicuous though no more forceful.

A revival of how vividly Patrick Henry drew the distinction, when he argued against the adoption of the Constitution of the United States in the Virginia Convention, will demonstrate the determination of the Confederacy to avoid embarrassment.

"Have they said We the States? Have they made a proposal of compact between the States? If they had this would be a *confederation*. It is otherwise most clearly a consolidated government. The question turns Sir! upon that poor little thing, the expression "We the people," instead of "We the States of America."

The Civil War in America will ever occupy a unique place in the history of the world's revolutions. With two branches of the general government, the legislative and judicial, in the control of their political friends, and the one only, the Executive, in the hands of a political adversary, one by one eleven States withdrew from the American Union, with grievances, pronounced by Charles Francis Adams, the elder, to be "mere abstractions," under an alleged constitutional liberty, the right to secede. It was and is persistently denied that slavery was the cause.

South Carolina, following her Ordinance of Secession, proclaimed and published "to the world" her "Declaration of the immediate causes which induce and justify the secession of South Carolina from the Federal Union." By the so called Personal Liberty Acts, laws passed to hinder the operation of the Fugitive Slave Law, it was charged that the non-slave-holding States had broken the constitutional compact, and that such breach released the other States, if they should so elect. That the South had been excluded from the common territory. That the Northern States had denounced "as sinful the institution of slavery" and had elected a man for President because he had declared "that this government could not endure permanently half slave and half free." No

other seceding State made formal proclamation. These grievances, however, stand typical of the prevailing causes elsewhere. None are now seriously maintained.

The Personal Liberty Acts were all repealed or would have been had not secession intervened before the State Legislatures met to do so.

The sole cause in which the South now finds its justification, is the resistance of the invasion by United States troops of territory which it is claimed had been rightfully withdrawn from the jurisdiction of the United States; the territory of the States that under their alleged constitutional right had seceded from the American Union.

II. Rawle as a West Point Text Book.

The text for those who maintain the affirmative of the interrogatory "Was Secession taught at West Point?" is clearly and concisely set forth in the "Prefatory Remark" to Col. Robert Bingham's "Sectional Misunderstandings," published in The North American Review of September, 1904, and subsequently reprinted separately "with brief additions."

It needs to be exhaustively considered that its unsound mode of reasoning may be overcome, and its mistaken conclusions corrected.

"The crux of the following paper is the historic fact, often asserted and never officially denied, that from 1825 (the year during which Robert E. Lee and Jefferson Davis entered the U. S. Military Academy) to as late as 1840, and probably later," "the United States Government taught its cadets at West Point from Rawle's View of the Constitution that the Union was dissoluble, and that, if it should be dissolved, allegiance reverted to the States. Some conclusive documentary proof of this historic fact is hereby offered for the first time as far as the writer knows or has been able to ascertain. In consideration of facts which cannot be gainsaid or denied, the words rebel, rebellion, traitor and treason should disappear, and NATIONAL AMERICANS should no longer do injustice to each other's motives, as every one who took up arms on either side of the War between the sections did so in obedience to the call to arms by his STATE, to which primary and ultimate allegiance was due according to the theory of the founders of the government and of their successors till 1860, and according to the official instruction given by itself at West Point to those who were to command its armies. The extracts from Rawle's 'View of the Constitution' hereafter given speak for themselves."

(Signed) R. BINGHAM.

The Bingham School, Asheville, N. C.

(From General Charles Francis Adams to Col. Bingham.)

Adams Building, 23 Court St., Boston, Dec. 8, 1904

. . . Herewith, under another cover, I send a copy of a publication of mine (The Constitutional Ethics of Secession), which bears very directly upon the point made in your letter. On page 16, in Note I, may be found all I know on the subject of Rawle's *View of the Constitution*, and the use of it as a text-book at West Point.

You will note I there state as a fact that his *View* was the text-book in use at West Point prior to 1840 . . . I remember that, at that time (two years ago), I looked the matter up with the utmost care, corresponding with the librarian and authorities at West Point and also with at least one legal authority in New York. The result, and my conclusion, are set forth in the note.

(Signed) CHAS. F. ADAMS.

And from page 11 of the Article:

"It would hasten the progress of harmony between the Sections, if the people

of the North would acquaint themselves with these historic verities; if they would cease to call "a" (the) "war a rebellion" . . "if they would realize that the Confederates were neither rebels nor traitors, that the Union . . created in 1789 . . "had" (been) "dissolved in 1861 justly and legally according to the conditions of the original compact." (C)

That the men of Massachusetts, of Pennsylvania, of New Jersey, or of any of the States of the American Union, who obeyed the call to arms of the President's Proclamation of 1861, did so, not in obedience to that summons, but in obedience to the call of their States to which they owed their "primary and ultimate allegiance," is indeed a revelation.

If the summons came from the States and obedience was in response to "primary and ultimate allegiance" due them; if it is an "historic verity" that the Union was justly and legally dissolved in 1861; if these are facts so conclusive that they "cannot be gainsaid or denied;" then the cause that was lost is the cause that was won, and the words, rebel, rebellion, treason, and traitor must be expunged from the surviving vocabulary of the war, for they never should have been there.

But who shall reconstruct the Constitution delivered to us by the "founders" and ratified by the whole people? Who will remould the opinions of those founders, those for and those against its adoption? Who will sacrifice a long line of judicial precedent beginning with the life of the Nation and continuing thereafter in unbroken sequence? Who is ready to accept this advanced thought of secession, that the withdrawal of States, many or few, dissolves the Union not alone as to themselves, but dissolves the Union as a whole? Who will fail to ever remember that the United States of America is and ever has been a Nation?

And hence, who shall seriously suggest a mutilation of the splendor of the word American? Where is the Englishman who would submit to be called a

---

(C) Alliance or Confederation.

"The Union of the States is perpetual and indissoluble; upon the admission of a State the Union between that State and the other States becomes complete and a State has no right to secede. at no time were the rebellious States out of the Union. The attempt of those States to separate themselves from the Union did not destroy their identity as States, nor free them from the binding force of the Constitution of the United States; their rights under the Constitution were suspended not destroyed, but their constitutional duties and obligations remained the same. The action of the rebellious states in setting aside their former governments and constituting new ones, connected with another so called central government, operated to suspend their practical relations with the Union, but did not in any degree effect a separation, and the constitution in force before the Ordinance of Secession continued in force after the overthrow of the Rebellion."

"The Ordinance of Secession and all acts intended to give it effect were null and void. It did not abrogate the constitution and laws then in force nor release citizens from their obligations of loyalty to the government of the United States." . . . . .

"The so called government established by the States in rebellion and designated the Confederate States of America never attained to the dignity of a de-facto government in such a sense as to give legal efficacy to its acts; it was simply an armed resistance to sovereign authority, and never had any existence except as organized treason" . . . . .

"Notes on the Constitution of the United States, William A. Sutherland, of the California Bar (1904), p. 240 et. seq. and the authorities there cited."

National Englishman or the German or the Frenchman who would consent to a like qualification? Our country is the American Nation, not a National America; who will disfigure a poetry, a prose, an eloquence so rich in patriotic tribute to the Americans as a people, to America as a Nation? Where would be your American Army with all its rich and blessed memories of battles fought and victories won? Where would be your American Navy with its story of many a fierce fight of the sea, and of its masterly struggles with the Storm King; if the qualifying word National were given them as a prefix the better to identify their achievements? Who shall rob us of the precious legacy Lowell left us of Lincoln: "New birth of our new soil, the FIRST AMERICAN."

It is better that a common country should have a common history. Is it unattainable, or is it only yet afar. Nor does like treatment Col. Bingham has given other differences, tend the better to inspire historic confidence. "Virginia claimed the right," he says on page 9, "*ipsissimis verbis* to come out at *will* and by tacit agreement the abstract right of secession was accorded to the other States." On the contrary Virginia claimed the right not to "come out at will" but only should the "powers granted" be perverted to her "injury and oppression."

Neither can it be contended that Virginia made a conditional ratification. If there be a conclusive historic fact conceded by advocate and adversary alike, it is that there could be no such thing as ratification with a reservation. It must be "*in toto* and *forever*" as said Madison the advocate. "After having once consented to it" (the Constitution) so said Mason the adversary, "we cannot recede from it." The vote was in conformity with the terms of the resolution of the Convention submitting the Constitution to the "people of the States" for their "assent and ratification." There could be no alternative, it was "for" or "against." Besides it was in full consonance with reason and necessity. Amendments could only be treated in the manner described in the instrument itself. The Convention had dissolved. To amend, alter, or supplement had been solely its province, who could recall it? It was a "referendum," purely a "yes" and "no" proposition. "The submission of a proposed Constitution which had been passed upon by the people's representatives in a convention, to a vote of the people for ratification or rejection."

And indeed the Virginia Convention itself, so treated this question of amendments, when it declared in its ordinance of adoption, "that whatsoever imperfections may exist in the Constitution ought rather to be examined in the mode prescribed therein, than to bring the Union into danger by a delay with the hope of procuring amendments previous to ratification."

The reservation of a resumption of the powers granted for cause, as has been shown, was a reservation for revolution for cause, not for secession "at will." And Madison wrote Washington that in the Ordinance of ratification there were "a few declaratory truths not affecting the validity of the act." *Bancroft's History of the Constitution* of *the United States*, Vol. II., p. 315. *Hare's American Constitutional Law*, Vol. I., p. 80.

Now what of the "tacit agreement" already largely disposed of by which "the abstract right of secession was accorded to the other States."

In the days when speech was free, and pamphlet, document, and procedure was carefully preserved and is now readily accessible, it seems anomalous that the construction of "the most wonderful work," as Gladstone styled it, "ever struck off at one time by the brain and purpose of man" "should be left to a

tacit understanding." Greek art, Roman jurisprudence, Egyptian lore, all the story of script alone, speak for themselves; the American Constitution, born of statesmen, reared by scholars, in an age of progress, scarce yet out of a national infancy, must have cotemporaneous opinion speak for it. But the Constitution really needs no sponsor. It speaks for itself, and will ever continue to speak for itself. It will still stand for itself and be of itself when future ages shall unfold a still higher culture, and the great Republic shall be as "ancient as the hills."

That this question, of Rawle at the Academy, has been given such undue prominence of late is due largely to environment. Its treatment by Schaff in his "Spirit of Old West Point" and Charles Francis Adams in his "Constitutional Ethics of Secession" give it something of a local flavor elsewhere. It had scarce a place in the literature of the times when secession severed the bonds of Union. It seems a manifest weakness that it should be so persistently urged now, when then, other and widely divergent grounds were pressed in justification of the course of the seceding States. The right to secede was fostered, fathered, and accomplished under the Calhoun theory alone. The Calhoun doctrine was paramount in the South, its only reliance in discussion, its sole dependence in emergency. The "crux" of the question as it is now presented is, that the government so committed itself by its official instruction at West Point to the right of a State to secede, thereby diverting allegiance from the Nation to the State, that citizen or soldier, who followed his State, should not be held to an accountability.

In support of this claim much stress is laid upon the contributions of oral testimony supplied by Col. Bingham's "Brief" in his "Sectional Misunderstandings." Some of this testimony is hearsay, some of it direct; some of it, official records fail to sustain, much of what remains, disappears with analysis, investigation, and comparison. Hearsay testimony at the best vulnerable, and at law wholly inadmissible, may be helpful to history to strengthen what competent proofs fail to wholly sustain, but certainly cannot be when its tendency is to weaken conclusions that competent cotemporaneous proofs had already previously fully established.

Here is a conspicuous illustration from Bingham's "Brief" of how present hearsay fails to overcome previous competent proof.

From John Rawle, grandson of Wm. Rawle:

Natchez, Miss., Jany. 27, 1905.

. . . In re. Wm. Rawle, my grandfather, I am aware that his view of the "Constitution of the U. S." was used as a text-book at West Point, but I do not recollect in what years it was. Gen. R. E. Lee et als. said that they were taught by that book, while at West Point . . . Genl. Lee told Bishop Wilmer of Louisiana, *that if it had not been for the instruction he got from Rawle's text-book at West Point he would not have left the Old Army and joined the South at the breaking out of the late war between the States.*

(Signed) JOHN RAWLE.

From Joseph Wilmer, a son of Bishop Wilmer:

Rapidan, Va., Feby. 10, 1905.

. . . . . I have a distinct recollection of my father's statement that Genl. Lee told him that "Rawle" was a text-book during his cadetship at West Point . . .

There is no disposition to apply acute legal criticism to the substance of these communications, but it cannot fail of observation that the son's recollection of his father's statement goes no farther than the use of Rawle as a text-book at the Academy, during Genl. Lee's cadetship. It might be noted also that John Rawle does not say "and the Bishop told me." That the information came direct is therefore a matter for inference only.

What Bishop Wilmer says that Gen'l. Lee said is emphatic and conclusive. It recognizes but the one reason the only motive. What Gen'l. Lee wrote and on one occasion said to another and what he told Bishop Wilmer are widely apart. Both cannot stand together. They cannot be reconciled. One must stand, the other must fall.

The following excerpts, cotemporaneous proof, over Gen'l. Lee's own signature, show his views on secession, the reasons that prompted, the motives that induced him to resign his commission in the United States Army. They clearly establish too that whatever remembrance of his academic teachings may still have lingered with him, these teachings had naught to do with his action.

From the oft quoted letter to his sister of April 20, 1861, announcing his resignation:

"The whole South is in a state of revolution into which Virginia after a long struggle has been drawn, and though I recognize no necessity for this state of things and would have forborne and pleaded to the end for redress of grievance, real or supposed, yet *in my own person* I had to meet the question *whether I should take part against my native State.* With all my devotion to the Union and the feeling of loyalty and duty of an American citizen I have not been able to make up my mind to raise my hand against *my relations, my children and my home.*"

And after the war, still Gen'l. Lee made no claim "that if it had not been for the instruction he got at West Point" he would not have "left the Old Army," and the talk here was all of the Army too.

On February 25, 1868, Gen'l. Lee wrote Reverdy Johnson concerning a tentative offer made before his resignation through Francis Preston Blair, tendering him the command of the Army. Among other things, he wrote as follows: . . "After listening to his remarks I declined the offer he made me to take command of the Army that was to be brought into the field; stating as candidly and courteously as I could that though *opposed to secession* and deprecating war I could take no part in an *invasion* of the *Southern States.*"

That Lee took his views of secession from the creed of his State and not from his West Point teachings is also fairly demonstrated by what here follows:

In the spring of 1866, Mr. Herbert C. Saunders, a London correspondent, had visited Gen'l. Lee at his home in Lexington. Upon his return to London, Mr. Saunders prepared a lengthy interview, the result of his conversation, and in quite a persuasive letter, enclosed it to Gen'l. Lee, asking his consent to its publication with such additions or corrections as he might see fit to make. After Gen'l. Lee's death, Saunders' letter, a copy of Lee's reply, and of the interview, were found in his desk in the President's office of the Washington and Lee University endorsed "London, July 31, 1866, Herbert C. Saunders asks permission to publish his conversation with me—Refused." The correspondence and the interview appear in full in Captain Robert E. Lee's "Recollections and Letters of Gen'l. Robert E. Lee." As this gives the interview a family endorsement and as the refusal does not appear to have been altogether absolute, a quotation from its "political bearings," may be fairly used as expressive of Gen'l. Lee's

views, particularly as "these bearings" are in full accord with what Lee had frequently said before.

"Turning to the political bearing (writes Saunders) of the important question at issue, the great Southern General gave me at some length his feelings with regard to the *abstract right of secession.* The right he told me was held as a *constitutional maxim* at the South. As to its *exercise* at the time on the part of the South he was *distinctly opposed* and it was not until Lincoln issued a proclamation for 75,000 men to invade the South, which was deemed clearly unconstitutional, that Virginia withdrew from the United States."

There is a phrase in this letter of Lee's to Saunders with something of a ring of admonitory suggestiveness about it, that might be appropriately quoted in this connection.

"I have" (says the General) "an objection to the publication of my private conversations, which are never intended but for those to whom they are addressed."

The following letter is specific and conclusive. As he there clearly makes it evident, Gen'l. Lee did not believe in the right of a State to secede. He takes his text too from the "framers," not from Rawle. The letter is to his son, is dated Fort Mason, Texas, January 23rd, 1861, and may be found on page 88, of the life of General Robert E. Lee, by his Military Secretary, Brig. Gen'l. A. A. Long, edition of 1886.

"Secession," says the letter, "is nothing but revolution. The framers of our Constitution never exhausted so much labor, wisdom, and forbearance in its formation, and surrounded it with so many guards and securities, if it was *intended to be broken by* every member of the Confederacy *at will.* It is intended for a 'perpetual Union' so expressed in the preamble, and for the establishment of a *government,* not a *compact,* which can only be *dissolved* by *revolution* or the *consent of all the people in Convention assembled.* It is idle to talk of secession. Anarchy would have been established and not a government, by Washington, Hamilton, Jefferson, Madison, and all the other patriots of the revolution. . . . Still a Union that can only be maintained by swords and bayonets, and in which strife and civil war are to take the place of brotherly love and kindness has no charm for me. I shall mourn for my country and for the welfare and progress of mankind. If the Union is dissolved and the government disrupted, I shall return to my native State and share the miseries of my people and save in defence will draw my sword on none."

Gen'l. Lee's earlier biographers were not convinced, and in this judgment they included Southern Officers generally of the Old Army, that either Lee for himself or they for themselves, conceded the right of a State to withdraw itself from the Union. "Accustomed to look at the flag as that which they were called upon to defend against all comers, they were loathe to admit the force of the reasoning which justified secession and called upon them to abandon it." The course pursued seemed to have been largely dictated by the one motive: "Their States called them and they obeyed."

But what really is there, in the somewhat superficial research given the question by those who insist upon it that Rawle's presence in the Academy during Lee's cadetship, and the consequent superficial results that have followed it, that puts Rawle in the Academy at all. The result is inconclusive, the treatment unsatisfactory. The case is not fully stated, the whole truth is wanting. The

search has been conducted more in an effort to sustain a cause, than in a disposition to find a fact. No story of a cotemporary writer or of the subsequent historian is deemed accurate, unless with a reasonable adherence to the laws of evidence, both sides of conflict or controversy have been duly weighed.

If indeed this text-book had a beginning at West Point, it was very close to its end. The margin between its advent and departure was very narrow. It was not as Thomas Nelson Page would have it understood as of "the text-books that were used there" that "taught the absolute right of a State to secede," but was the only book of its kind and of its time. Neither did any other book there teach such a doctrine It was not there by authority of the Academic Board. There is no such record. If there for a time, it found entrance through some other than an authorized source.

The question has been deemed of sufficient moment to demand official inquiry, and recently within the past year Col. Edgar S. Dudley, Judge Advocate U. S. A. and Professor of Law at the United States Military Academy, was designated by the Superintendent of the Academy to investigate the records and ascertain whether "Rawle's View of the Constitution" had been used at West Point.

Col. Dudley's report of his investigation has been made to the Superintendent, is now with the War Department, but has not yet been given to the public. Of this report the Judge Advocate General writes as follows:

"In the matter of the report, which was made to the Superintendent of the Military Academy in respect to the use of Rawle's text-book on the Constitution, the reports of Col. Dudley and Captain Berry while very interesting are hardly conclusive, since they reach the conclusion that the book was never used as a text-book at West Point."

"I enclose you one or two extracts from Col. Dudley's report, one being a citation from General Heintzelman, and another the letter of Jefferson Davis, from which it appears, to my mind, very conclusive that the book was used at some time between 1825 and 1829."

The enclosures were copies of the John Rawle's and John Wilmer's letters (not Jefferson Davis,) concerning the Bishop Wilmer's statement of Gen'l. Lee's West Point instructions, which have previously been considered, and the General Heintzelman's extract which here follows, together with the comment that concludes it, made either at the Academy or by the Judge Advocate General.

Extract from the Heintzelman Journal:

"Since the above was written the Librarian of the Academy has called the attention of the Superintendent to the fact that he has found reference to the subject in a Journal of S. P. Heintzelman, U. S. Army while a Cadet in the Military Academy, West Point, New York, from January 1st, 1825, to July 22nd, 1826, and to August 2nd, 1826, presented by his grandson, Stuart Heintzelman, U. S. Army, Class of 1899, in which the following record is found:

1826

January 30 "I recited to-day for the first time in Political Economy."

February 21st "I drew from the Quartermaster Rawle on the Constitution."

Feby. 23 "We have finished our political Economy and recited once on Rawle."

Mar. 28 "We have finished the Constitution . . .

June 7 "I was examined to-day in Political Economy and Rawle" .

June 19 "Mr. McIlvaine gave us a kind of a valedictory yesterday."

"This appears to settle the doubt as to the use of Rawle as a text-book by Professor McIlvaine, though no authority of the Academic Board therefor is shown or is of record."

The Jefferson Davis letter, dated July 1st, 1886, addressed to Col. R. T. Bennett,—Col. Bennett was the Colonel of the 13th North Carolina Infantry, C. S. A.,—apparently first became accessible to the general reader when it was quoted by Col. Bennett in his address entitled "Morale of the Confederate," delivered at the "Laying of the corner stone of the Confederate Monument at Raleigh, N. C., May 22nd, 1894." The address is published in the Southern Historical Society Papers, Vol. XXII, page 83. Whenever cited it has been from that publication. How the letter happened to be written, whether the whole or a part of it only is given in the address, does not appear. As previous references to it as an authority disclose it no further than it there appears, a better understanding may be had if fuller quotations be supplied from its context.

MORALE OF THE CONFEDERATE.

Extract

"Mr. Crawford of Georgia advised secession on the part of the South as early as 1820.

"There was no doubt then about the right of a State to secede from the Union.

"Rawle the Pennsylvanian in his book on the Constitution says:

" 'The Secession of a State from the Union depends on the will of the people of such State. The States then may wholly withdraw from the Union, but while they continue they must retain their character of representative republics.'

"Tucker of Virginia is as explicit as Rawle on this point.

"President Davis wrote me July 1st, 1886: *Rawle on the Constitution was the text-book at West Point, but when the class of which I was a member entered its graduating year Kent's Commentaries were introduced as the text-book on the Constitution and international law. Though not so decided on the point of State sovereignty he was far in advance of the consolidationists of his time.*"

"The University of North Carolina and every other institution in the State devoted to the education of our youth which receives the benefit of State endowment should be required to teach those in their charge the theory of the Constitution which conceded the right of the States of the Union to withdraw therefrom for causes deemed sufficient by the state.

"So that the term of reproach 'Rebel' now imputed to our people would be shorn of that meaning which causes the average man a tremor of shame.

"Happily our people as a rule are not in a hurry to condemn the action of the South in their efforts to form a government more consonant with their rights than the government of the United States."

. . . . . .

"Distant ages in their majestic march will pause at your graves, while philosophers and lofty souls will say:

"These men have a just cause, they were dutiful sons of indestructible States.

'Their actions were worthy of their day, their achievements were worthy of all time."

The first introduction of the Jefferson Davis letter to the public, so far as is now known, does not seem therefore to have been the outgrowth of the present inquiry as to when, how, or why, if at all, Rawle found its way into the Military Academy and what was the length of its sojourn there. The purpose of the introduction of the letter from the context seems clearly to have been to show that the doctrine of secession, as there enunciated, was not only of a broader scope than mere locality, but that that scope was also wide enough to secure for it a national recognition. It does not need to be demonstrated that an answer to these inquiries as to how, when, or if at all Rawle reached the Academy, is quite an essential here.

The facts here developed, it is submitted, will fully justify the conclusion that secession was never taught at West Point, to those whom it is claimed it was, and to the others, the few who may have been taught it, the further conclusion that they learned of it so meagrely that it had naught to do with any action of their later lives.

Jefferson Davis never studied Rawle at West Point in the course of his instruction. He does not say that he did. His letter does not claim that he did. He entered the Academy September 1st, 1824, delay in the receipt of his appointment prevented his entrance at the beginning of the class year, July 1st. He entered his graduating year July 1st, 1827, and graduated July 1st, 1828. "Constitutional Law" was taught in the graduating year only; "*but when the class of which I was a member entered its graduating* year *Kent's Commentaries* were *introduced as the text-book on the Constitution and international law.*" Davis did not study Rawle at West Point. He says so himself.

The views of Professor William E. Dodd, of Randolph Macon College, on pages 26 and 27 of his Biography of Jefferson Davis, of the "American Crisis Biographies," published by George W. Jacobs & Company, Philadelphia, 1907, and the authority he supplies in his foot note in support of them are rather in confirmation of, than apart from this conclusion.

"That he" (Davis), says the Professor, "had imbibed States' rights views from text-books or teachers at West Point, is probably only a theory of later years; for text-books seldom impress so indelibly the minds of their weary readers, and in 1828 *the teachings of governmental science had hardly made a beginning.* It is safe to say that Davis accepted his commission without serious question as to the nature of the government that gave it."

And this is the foot note:

"D. H. Maury" (Southern Historical Society Papers, Volume VI, p. 249) "says Calhoun ordered Rawle's *View of the Constitution of the United States* to be used as a text-book at West Point in 1822 and that it remained in use there until 1861. The book was first published in 1825 but the *Superintendent writes that there is no reason to suppose that it was ever prescribed for the classes of the Academy.*"

Robert E. Lee did not study Rawle at West Point in his course of instruction. Nor did he ever accept his doctrine. Lee was not of Davis' class, as stated in the Bingham Brief. He entered the Academy July 1st, 1825, and graduated July 1st, 1829, No. 2 in his class. Kent had been a year in the institution when Lee's graduating year began. Kent not Rawle was in the course of study on constitutional law during that year. The year covered the period from July 1st, 1828, to July 1st, 1829.

The Heintzelman diary identifies the graduating year as the period prescribed

by the "course" for the teaching of constitutional law, and so far corroborates the Davis letter. It indicates too that at that time at least, this branch was rather an incident than an essential in the academic curriculum. Heintzelman was made a Major General of Volunteers during the Civil War and was subsequently retired with that rank in the permanent establishment. He entered the Academy July 1st, 1822, and graduated July 1st, 1826. His graduating year therefore was from July 1st, 1825, to July 1st, 1826. The diary covers a period "from January 1st, 1825, to July 22nd, 1826, and to August 2, 1826." Although his year for the study of constitutional law, Rawle being then in use, began with July 1st, 1825, he seems to have been in no haste to take it up It was not until the year was more than half gone, February 21st, 1826, that he "drew from the Quartermaster Rawle on the Constitution." The no haste with which he took up the study of Rawle is in strong contrast with the much haste with which he hurriedly pursued it. Two days after the requisition had been filled, he had as is told in the diary in the entry of February 23, 1826, "recited once on Rawle." Then thirty-three days go by and with no intermediate information of recitations or persistent diligence, on March 28, 1826, appears the significant entry "We have finished the Constitution," and his task was complete. In the intervening two months and upwards there is no intimation as to whether he had kept himself in touch with his subject, but on June 7, 1826, the diary states "I was examined to-day on Political Economy and Rawle." June 19 announces the parting of class and Professor on the day previous. Heintzelman's standing at graduation was 18, in a class of 42.

Such a course of study is not likely to impress the teacher with the importance of his mission, nor the pupil with the value of his instruction. It is not likely either that such perfunctory and superficial treatment had the endorsement or supervision of the authorities. Its tendency is to confirm the finding that Rawle had never been admitted by the Academic Board or "prescribed for the classes." To hurriedly dispose of, in so short a period, of a work covering upwards of three hundred pages, upon a theme entirely of itself, not following in sequence like studies that led to it as their consummation, offers but little incentive to the learner or inducement to the teacher. Instruction imparted merely for the sake of getting through can have little weight, when offered as testimony to sustain the proposition that it induced beliefs that grew to convictions with riper years. Nor does it supply a proof that the book or the method of expounding it had the countenance or approval of Academic authority.

The Mr. McIlvaine of the Heintzelman diary was the Rev. Charles Pettit McIlvaine (1799-1873). It will be of interest to briefly trace his environment and follow his associations. Born in Burlington, New Jersey, he was graduated at Princeton and from 1825 to 1827 was Chaplain and Professor of Ethics of the West Point Military Academy. Subsequently after several ministerial charges he was made the Protestant Episcopal Bishop of the State of Ohio. He was a close friend of the Hon. Salmon P. Chase and a confidential correspondent, while Chase held the Treasury. During the Civil War he was a member of the United States Sanitary Commission. Visiting Europe he lent material aid to the Union cause by forceful and effective public speech.

If the government had designed that the doctrine of secession should be "taught" at its Military Academy, "according to official instruction given by itself," it would certainly have provided a teacher in some sympathy with his subject The selection of Professor McIlvaine would not indicate that it had.

However Rawle may have reached the Academy, it may have been by invitation, it is declared not to have been by authority, its stay there was brief. Its entrance cannot antedate its publication. It could not therefore have been in 1822 as Gen'l. Maury has stated. Nor could it properly be attributed to a political motive, as the General seemingly intimates. Monroe's administration has been significantly designated as the "Era of good feeling." Calhoun, his Secretary of War, who as Maury also says directed its installation, had not yet definitely announced his views on or his doctrine of secession. He was subsequently elected to the Vice Presidency and still had aspirations for the more exalted place.

The evidence of the date of the publication of the first edition of Rawle is conclusive. It shows Maury to have been mistaken.

The Rawle memorial of 1837 says: "In 1825 Mr. Rawle published his first edition of his View of the Constitution of the United States" . . .

"The opinion entertained by the public of the value of this treatise is shown by the circumstance of its having gone through three editions and having been adopted as a text-book on instruction in several of our literary institutions."

The first edition bears on the title page the imprint 1825, and the copyright was issued January 29th, 1825.

An entry in one of the few books of the publishers Henry C. Carey and I. Lea that can now be found, may be of interest to the curious. The book is without a designating title, but is supposed by the successors of that firm to have been known as the "Production Book." The entry is without specific date, is of the year 1825, but so located as to show that it was made about the beginning of that year, and reads as follows: "Rawle on Constitution, 500 copies. Catalogue price $3.50, trade discount 1-3rd off."

It is quite clear therefore that Rawle could have had no place in the Academy before 1825. Its departure in 1827 though perhaps not so well attested by conclusive evidence may be fairly said to be equally as well established. No effort to show that it ever came back between 1827 and 1840 has been successful and the records after that year make it clear that it was out forever.

From the two classes, the one graduating in 1826, and the other in 1827, when Rawle may have been the text-book on constitutional law, but two of the Southern cadets became prominent in the Confederate service. Albert Sidney Johnston was of the class of 1826 with Heintzleman. Leonidas Polk was of the class of 1827. Phillip St. George Cooke, appointed from Virginia of the same class, remained in the United States service. Joseph E. Johnston was in Lee's class.

That at this time and continuously afterwards, the graduating year was the only year prescribed for the study of constitutional law, is well supported by authority.

With a supply of material furnished by the Adjutant of the United States Military Academy and the Librarian, the Acting Judge Advocate General of the United States Army and the authorities of the Library of Congress, Professor Walter L. Fleming, of the Louisiana State University, contributes to the Metropolitan Magazine for June, 1908, a valuable and instructive article on "Jefferson Davis at West Point." The extracts that follow are from the Professor's text:

"The good reputation of the school was mainly due to the work of Major Sylvanus Thayer, who became Superintendent in 1817, and at once began to

reorganize the school upon French lines, the famous Ecole Polytechnique being the model." . . . . . .

"The course of study at West Point was the best offered in America in applied science and mathematics. There were nine hours a day of recitations, five days in a week for *four years*, and these recitations were rigorous. During the first year the studies were mathematics six hours a day, and French three hours; in the second year the work was the same except that drawing alternated with French; the third year subjects were natural philosophy five hours a day, "chemical philosophy" two hours, and drawing two hours; in the *last* year the cadets studied engineering five hours, chemistry two hours, *and constitutional law*, ethics, rhetoric, etc., two hours. This course of study organized by Major Thayer has remained *essentially unchanged*."

That the graduating year, first set apart by Major Thayer as the year for the study of constitutional law, has remained unchanged is confirmed from various sources. More conspicuously, subsequent to 1840, from the "Synopsis of the Course of Studies and Military Training at the U. S. Military Academy," that each year thereafter was and still is published with the Annual Official Register. There under the head of Department of Ethics, prescribed for the First Class, fourth year cadets only, appears Kent's Commentaries, grouped with such studies as Blair's Rhetoric, Paley's Moral Philosophy, Hodge's Elements of Logic. And there Kent's Commentaries continues to appear in each successive yearly Official Register from 1841 to 1876. Changes appear from time to time in the text-books on the other subjects, the Department is newly designated in 1860 as the Department of Law and Literature, and again in 1868 its designation is changed to the Department of Ethics and Law, but the text-book on constitutional law remains the same.

In 1877 and 1878 Pomeroy's Constitutional Law supplants Kent. Kent returns in 1879 and in 1880 finally disappears. Cooley's General Principles of Constitutional Law follows in 1881 remaining until 1898, to be substituted for the next two years by Andrew's Manual of the Constitution, when Flanders takes its place in 1900 and still remains.

No text-book on constitutional law was ever in use at the United States Military Academy, prescribed for the classes, by government authority, that recognized the right of a State to secede from the American Union.

This introduction of the "Synopsis" recalls two pieces of direct testimony submitted in the "Bingham Brief" not heretofore disposed of, offered in support of the presence of Rawle at the Academy after the annual publication of the "Course of Study." In one the witness testifies as to his "recollections" only; in the other the witness asserts the fact with an assurance of conviction. The evidence as presented in the "Brief" appears in the one case as a letter, and in the other as an extract from an article in the "Southern Historical Society Papers," and is as follows:

(Letter From Gen'l. Fitzhugh Lee.)

Norfolk, Va., Dec. 5, 1904.

. . . My recollection is that Rawle's View of the Constitution was the legal text-book at West Point when Generals Lee, Joseph E. Johnston, and Stonewall Jackson were cadets there, and later on was a text-book when I was a cadet there.

(Signed) FITZHUGH LEE

(Extract From Gen. Dabney H. Maury.)

(Vol. 6, p. 249, So. Historical Papers.)

. . . It (Rawle) remained as a text-book at West Point till——; and Mr. Davis and Sidney Johnston and General Joe Johnston and General Lee, and all the rest of us, who retired with Virginia from the Federal Union, were not only obeying the plain instincts of our nature and dictates of duty, but we were obeying the very inculcations we had received in the National School. It is not probable that any of us ever read the Constitution or any exposition of it except this work of Rawle, which we studied in *our graduating year* at West Point. *I know I did not.*

(Signed) DABNEY H. MAURY.

The Maury extract can be the better understood if the paper from which it is cited be given in full. There is more significance in the whole than a part of a story, and testimony weighs better when temper, tone, and motive are available to determine its value.

Southern Historical Society Papers. Vol. VI., December, 1878 No. 6, p. 249.

West Point and Secession.

By General D. H. Maury.

"I wish I could have seen Dr. Curry before he sent his letter vindicating Gen'l. Lee from breach of faith in returning to his natural allegiance to Virginia, when that State withdrew from the Federal Union; I would have given him some facts, which were very strangely unknown to our people and were always ignored by our enemies.

"When Mr. Calhoun was Secretary of War, in 1822, I believe, he caused a text-book to be introduced into the course of studies at West Point, known as 'Rawle on the Constitution.' This Rawle was a Northern lawyer of great ability, one of the very few who seem to have understood the true nature of the terms and conditions of the compact between the States constituting the Federal Union. His work, 'Commentaries on the Constitution of the United States,' breathes the very essence of States' rights and the right of secession is distinctly set forth by him. When we remember that only seven years had then elapsed since New York, Vermont, Connecticut, and perhaps other Northern States asserted this right and threatened to exercise it or make dishonorable terms of peace with Great Britain unless the war was stopped, we can understand that Mr. Calhoun was not violating Northern sentiment in introducing Rawle at West Point. It there remained a text-book till 1861 and Mr. Davis, and Sidney Johnston, and Gen'l. Joe Johnston, and Gen'l. Lee and all the rest of us who retired with Virginia from the Federal Union were not only obeying the plain instincts of our nature and dictates of duty, but we were obeying the very inculcations we had received in the National School. It is not probable that any of us ever read the Constitution or any exposition of it except this work of Rawle, which we studied in our graduating year at West Point. I know I did not.

"I am told that in 1861 the text-book was changed and the cadets are now taught out of a treatise on the Constitution which teaches that secession is a crime.

"And if any one of the present generation should resign on the secession of his native State, *he* will be in danger of being lawfully hanged."

DABNEY H. MAURY.

Maury wrote heedlessly. Apparently in facetious speech, "*he* will be in danger of being lawfully hanged," he had fallen upon the substance if not the form of expression that Luther Martin, the Constitution's most formidable adversary, had used when in the Constitutional Convention he strenuously opposed the adoption of the article that determined that to make war against the United States or aid, or abet, or comfort or adhere to their enemies was treason.

"An attempt," said Martin, "to subvert the government of the United States by force of arms is obviously treason under this article, though made in pursuance of an ordinance of secession or other law enacted by a State." . . . . "The States are therefore reduced to this alternative,—they must tamely and passively yield to despotism or their citizens must oppose it at the hazard of the *halter*."

This reasoning urged so forcefully against, but accepted as a conclusive argument for adoption—there had been no attempt to define treason since the Colonies had been severed from the Crown—induced Martin, to test the strength of his position, to vigorously press an amendment. "Provided, That no act or acts done by one or more of the States against the United States, or by any citizen of any one of the United States under the authority of one or more of the said States, shall be deemed treason or punished, but in case of war being levied by one or more of the States against the United States the conduct of each party towards the other and their adherents respectively shall be regulated by the laws of war and of nations."

The amendment was rejected and the article as proposed adopted. This action of the "founders" had a double significance, while it ignored secession as a right, it recognized coercion as a power.

Maury apparently goes too far. Bingham himself seems unwilling to accept him in full. In his quotation . . . "It (Rawle) remained as a text-book at West Point till ——;" he omits the year with a dash —— As it appears in the original the phrase reads, "It there remained a text-book till 1861." The year is important. Why it is not in evidence is not disclosed.

The statement that Calhoun, while he was Secretary of War in 1822, "caused" Rawle to be introduced as a text-book at West Point is hasty, misleading, and inconsiderate. Calhoun was Secretary of War during the two terms of Monroe, and was inaugurated Vice President on the fourth of March, 1825. The book was certainly not known while Calhoun held the War Office and was scarcely on the market when he had passed into another sphere of public life.

The intimation that Calhoun had caused the introduction of the work in the Academy, chiefly for its secession views, is an equally inconsiderate statement. Aside from the fact that there was no Rawle in existence at the time, to be so disposed of, it will be remembered that Calhoun's decided Southern political preferences were not distinctly avowed until some years afterwards, when in his second term, he resigned the Vice Presidency.

Dabney H. Maury, appointed at large, was admitted as a cadet in the United States Military Academy July 1st, 1842, and graduated July 1st, 1846. As a Lieutenant, two years after his graduation, he was assigned for the succeeding two years as an Instructor for the Fourth Class in grammar, rhetoric, and geography. Stonewall Jackson was also of this class.

In the Official Register for the year "June, 1846," on the Roll of Cadets,

FIRST CLASS, appear the names of Thomas J. Jackson (18) and Dabney H. Maury (37).

Under the head "*Synopsis of the Course of Studies at the U. S. Military Academy*," an appendix to this Official Register, there appears as the prescribed text-books:

FIRST CLASS—Department of Ethics—Blair's Rhetoric, Wayland's Elements of Moral Science, abridged, *Kent's Commentaries*, Hodge's Elements of Logic.

Maury served as a cadet of the First Class through his graduating year from July 1st, 1845, to July 1st, 1846. *Kent's Commentaries* was the text-book on constitutional law prescribed for that year and that class by the "Synopsis of the Course of Studies." Rawle's "Views of the Constitution" on the contrary was the prescribed text-book as affirmed by Maury in his article, "West Point and Secession," of December, 1878. "It is not probable," he says, "that *any of us* ever read the constitution or any exposition of it except this book of *Rawle* which *we studied in our graduating year* at West Point. *I know I did not.*"

This declaration is emphatic and explicit. It cannot escape comment. Under all recognized rules oral testimony must yield to record evidence. Here the one so flatly contradicts the other, that unless the record can be satisfactorily explained away, the oral statement cannot be accepted.

Fitzhugh Lee entered the Military Academy in 1852 and graduated in 1856. From July, 1855, to July, 1856, his graduating year, Lee was of the First Class. For that year by the "Synopsis" Kent's Commentaries was the prescribed text-book on constitutional law. According to Lee's "recollection" it was Rawle. A mere recollection cannot be expected to supplant a record.

The advocate who fails to review a leading authority of his adversary has yielded a valuable concession. The historian who overlooks or omits a proof of material consequence weakens his conclusions.

The Jefferson Davis letter is helpful to a definite conclusion. The failure to recognize this testimony, by those who insist that the government committed itself to secession, when it introduced a text-book in its Military Academy that taught that doctrine, invites comment.

The letter conclusively establishes the one fact at least, that whether or not Rawle was ever "prescribed for the Classes," its life at the Academy was but a scant two years, from 1825, the date of its publication, to 1827, Davis' graduating year. Written in 1886, so far as is now known, the letter first appeared in 1894 in a periodical published in the South, of wide circulation and universally read. It there appeared as a citation in an oration, notable for its felicity of speech and purity of diction, delivered by an eminent jurist and a distinguished soldier of the Confederacy, on a ceremonial occasion, prominent before the general public at the time. It was consequently accessible to both Col. Bingham and Prof. Fleming. In "Bingham's Brief," however, all reference to the Davis letter is conspicuously absent. In "Jefferson Davis at West Point," no allusion whatever is specifically made to it, though a knowledge of its existence might be inferred from this sentence in the body of the article, "Kent's Commentaries," just then out, were eagerly read by the cadets, but a most interesting text-book then in use at West Point, was "Rawle on the Constitution."

This effort to commit the government to a recognition of the doctrine of

secession because it was "distinctly taught" at its Military Academy, particulary when cadets were being trained who subsequently resigned from the Army, when their States seceded, has proved a failure. Prominent in literature and law as are the men who have strenuously directed it, a close investigation of their case as presented has developed its manifest weakness. Secession was not taught at West Point. This introduction of matter, somewhat in the nature of after discovered evidence, will not justify the re-opening of a case long since ended, but apparently not yet settled. Briefly, what was the case.

The issue well defined was duly framed. The "declaration" was tersely drafted by Lincoln, the masterful statesman, the skillful pleader. "My paramount object in this struggle is to save the Union and is not either to save or to destroy slavery." The answer followed, and is now made to more concisely appear as "Our object is to dissolve the Union under a paramount right secured to every state by the Constitution, to secede at will; and thereby as an incident thereto, but not as a part thereof, to save slavery."

The issue was fiercely litigated, with fire and sword, for four years in the high Court of War, and judgment was finally rendered at Appomattox Court House, Virginia, for the Union and against its dissolution.

Slavery had been previously abolished by decree and was afterwards destroyed by law.

LIBRARY OF CONGRESS
0 012 026 624 A